Central Law Journal.

ST. LOUIS, MO., MARCH 3, 1905.

LIABILITY OF FURNITURE MOVER FOR LOSS OR DAMAGE TO GOODS MOVED.

An interesting discussion of the liability of a furniture mover for loss or damages to goods moved or carried by him is to be found in the opinion of the court in the recent case of Jaminet v. American Storage and Moving Co., 84 S. W. Rep. 128, where the Missouri Court of Appeals held that where a corporation agreed to move plaintiff's furniture, and to be responsible therefor, it did not thereby warrant the safe delivery of the furniture at all events, and was therefore not chargeable for the loss of a painting destroyed by the wanton act of a third person.

The evidence in the case showed that the defendant promised to move plaintiff's goods safely, and to be responsible therefor. It appeared also, however, that the injury complained of was to an oil painting belonging to plaintiff, which defendant, after removing from the house sat upon the sidewalk leaning it against a tree. A small boy in a spirit of mischief struck the painting with a sharp stick, tearing it very badly. There was a judgment for plaintiff from which the defendant appealed.

The respondent in seeking to justify the judgment cited the court to the principle that when a party, by an absolute agreement, imposes a duty on himself of performing an act, he is not relieved of liability on this obligation by a subsequent event which renders performance impossible. The court said however: "But is the rule mentioned the proper test of the appellant's liability? Liability on its part as a common carrier was excluded. It stands, therefore, as a private carrier (*locatio mercium vehendarium*) or bailee for hire, subject only to the duties and responsibilities of such a bailee, unless by agreement it assumed additional ones. Now, what are the usual duties and obligations of such a bailee? To give the care, skill, and diligence to the effort to safely carry and redeliver the bailed property to the bailor that are commonly given by men in the same employment. Such a carrier, like other bailees for hire, is only responsible for losses occasioned either by his own or his servants' negligence. Story, Bailments (9th Ed.), art. 4, § 457; Hutchinson, Carriers (2d Ed.), 37; United States v. Power, 6 Mont. 271, 12 Pac. Rep. 639; White v. Bascom, 28 Vt. 268; Varble v. Bigley, 14 Bush (Ky.), 698, 29 Am. Rep. 435. It follows from the above doctrine and authorities that the appellant was not bound at all events to deliver the respondent's goods, including the portrait, in an undamaged state, at her new home, by force of its general obligation as a common carrier for hire; and could have become thus bound only by a special term in the contract between the parties, by some definite stipulation or warranty superadding to the ordinary duty and responsibility of a private carrier a responsibility akin to that resting on a common carrier. *Prima facie*, the appel'ant was liable, as the portrait was bailed to it in good condition and was returned damaged. But the proof is that the damage happened without the fault of appellant's servants, and in a way that no man could have foreseen or prevented. That makes a good excuse for a bailee not bound by a special undertaking. Claflin v. Meyer, 75 N. Y. 260, 31 Am. Rep. 467; Stewart v. Stone, 127 N. Y. 500, 28 N. E. Rep. 595, 14 L. R. A. 215; Mills v. Gilbreth, 47 Me. 320. 74 Am. Dec. 487."

The respondent's next contention was that even though a bailee for hire does not impliedly warrant the safety of the goods in his possession, yet they may do so by a special undertaking, and that the promise of the appellant in the principal case amounted to such a warranty. To this contention the court replied as follows: "Without being technical or precise about the definition of a warranty, we may safely say that it must be a stipulation in a contract by which one party binds himself to answer to the other in a certain regard. Like any other stipulation, it consists in an agreement between parties; a meeting of minds as to a particular matter. Now, if the appellant warranted the safe carriage of the portrait, it cannot escape liability for its loss, though caused by the wanton and surprising act of a stranger. The case, therefore, comes down to the question of whether the testimony justifies the interference that appellant contracted against any injury to the respondent's por-

trait and other property, except such as might happen by the negligence or unskillfulness of its employees. Can it fairly be said, on any aspect of the evidence, that appellant contracted against injury by the malicious act of a third person? Was the scope of its agreement larger than the ordinary undertaking of a person who assumes to move valuable property; that is, an undertaking to exercise skill and care? To our minds, the respondent's own testimony furnishes a conclusive answer to this inquiry. She swore the appellant's manager, Langdale, with whom she made the contract, said he was responsible, "and would move them (the goods) with care, and deliver them safely." Plainly, the only undertaking by Langdale, to be gathered from that statement, was for the careful moving and safe delivery of the property; that is, he assumed responsibility for care in moving and for safe delivery as far as appellant's servants were concerned, not for the safety of the goods in any event, including the chance of malicious destruction by an outsider. In our judgment, no broader contract is justly deducible from what passed between the parties than the ordinary one of a bailment or hire; the undertaking of a private carrier to use care and skill. There was no warranty against every loss, and no thought in the mind of either party of such a loss as happened, or of any loss from extraneous causes."

It is observed that the position of the court in the principal case is that the obligation of a private carrier for hire is identical with that of any other kind of bailee for hire, and is to exercise reasonable care and skill in preserving the property entrusted to him, and that this obligation is not allowed by a mere agreement to carry safely by what is technically known as an express warranty. This view of the law is apparently supported by the authorities. See Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Ames v. Belden, 17 Barb. (N. Y.) 513; Robinson v. Dunmore, 2 Bos. & P. 416; Hutchinson, Carriers (2d Ed.), sec. 840. Thus, the case of Ames v. Belden, *supra*, was based on a charter party by which certain boats had been let to the defendant for use during two months, to be returned by the charterer after their use "in as good condition as they now are, with the exception of the ordinary use and wear." It was held, on a review of the decisions, that those words did not enlarge the bailee's common-law obligation, which extended only to the exercise of reasonable care.

Cases can be found in the books which are inconsistent with those cited above, and wherein the judgments were on contrary principles. Such, possibly, is the old case of Kettle v. Bromsall, Willes, 121, wherein it is said that, if the goods be delivered to one to keep safely, the depository is liable if robbed of the goods. Also Drake v. White, 117 Mass. 10, wherein the defendant, as pledgee, was held on an agreement to redeliver the pledge, or its equivalent in money; the pledge having been destroyed by fire. Also Harvey v. Murray, 136 Mass. 377, where the bailee agreed, regarding the bailed article, "to return it in as good order as when received, customary wear and tear excepted;" the article having been destroyed by a storm. Such rulings seem to be opposed to some of the precedents we have cited. In attempting to reconcile this conflict of the authorities, the court in the principal case says: "As a possible ground of distinction between and reconciliation of the cases, we have thought of this notion: That when property is bailed for hire to a party who is to do something with it for the bailor—like transporting it—an agreement to do so safely is referred to the task to be performed, and held to mean no more than that skill and care will be devoted to that task; but when the bailee is not employed to do anything with the property, yet nevertheless binds himself to return it safely, the obligation is taken to be general, and without exception, as none is named, and there is no particular undertaking in regard to the property to which the obligation to return in safety can be referred and confined. We are not sure that this notion is valid, or will suffice to explain and reconcile all the cases. It could have no reference, of course, to controversies where the essence and purpose of the agreement were the employment of a bailee to care for property, he assuming responsibility, not only for his own care and skill, but for losses due to other causes; as where a trunk or valise is left with a checking office."

NOTES OF IMPORTANT DECISIONS.

CARRIER — LIABILITY FOR FREIGHT DESTROYED BY FLOOD.—The great flood of the Mississippi at East St. Louis in 1903, resulted in a great loss of freight, by reason of the fact that thousands of freight cars billed for St. Louis could not be sent across the bridge and had to be held on the east side of the river. St. Louis, it must be remembered rises abruptly from the river and is built on a succession of hills and mounds running parallel to the river increasing in height as one proceeds westward. There is therefore no danger from flood to that city, and the railroad yards there are always safe from inundations. On the opposite side of the bank lies East St. Louis on a low sandy plain, at one time said to be a former bed of the Mississippi. Every spring there is an inundation over a large part of East St. Louis, but up until the spring of 1903 the flood had never been sufficient to rise above the embankment which protected the railroad yards in that city. In the flood of that year, however, this embankment was destroyed and hundreds of cars of freight destroyed.

A good illustration of the litigation that arose out of losses occasioned by this flood is to be found in the recent case of Grier v. St. Louis Merchants' Bridge Terminal Railway Co., 84 S. W. Rep. 158, where the court held that the defendant was not liable for the value of a car of goods billed for St. Louis destroyed by the flood by reason of being detained in the railroad yards of East St. Louis. The court in its opinion gives this interesting account of the disaster and its opinion of the duty of the railroad company under the circumstances:

"The first question is, did the appellant repel the *prima facie* case made by the respondents by showing, beyond fair inference to the contrary, that the loss of the oats was due entirely to the flood? We will recite the substance of the testimony introduced for that purpose. During the flood of June, 1903, the Mississippi river rose to the highest stage of water ever known, except in the year 1844. The embankment of the Chicago & Alton Railroad Company was, as said above, depended on for protection against overflow of the river by the appellant company and several railroad companies, as well as by the inhabitants and authorities of the towns in the Mississippi river bottom opposite St. Louis, and by the proprietors of many costly manufacturing establishments. It was a very substantial and massive structure, and had proved an adequate protection during several other great floods. The officials of those towns, and the employees of railroad companies and manufacturing companies whose properties were threatened by the overflow, strenuously labored to strengthen and preserve the levee for several days before it broke. The testimony shows that most of the interested persons and corporations took it for granted the dike would hold, and be high enough to save the adjacent bottom from inundation. It was high enough, and strong enough, too, except in one place, where the water broke through. It is important just here to determine exactly what was the proximate cause of the loss of the wagonload of oats. When this car was received, the yards were perfectly dry, and were expected to remain so. The car was placed on the appellant's track at about the highest point in its yards at Madison, and sufficiently high, as the event proved, for the body of the car to be a foot and a half above the water at its extreme stage. The oats would not have been soaked by the mere submergence of the yards, and their destruction was not an incident of that occurrence. The water never rose high enough above the spot of ground where the car was left to run on to it; but the current of the stream of water which burst through the crevasse a mile and a half north hit the railroad embankment exactly where the car of oats stood, and washed the dirt from under the rails, thereby capsizing the car. This happened to only three of the sixteen cars which stood on that particular track. In truth, it seems that only eleven of the four or five hundred car loads of freight in appellant's yards were damaged by the overflow. Now, who could anticipate that a catastrophe of the sort which befell the car load of oats would happen? The appellant's employees supposed the car stood on a point of ground high enough to insure perfect safety, as in no previous flood had the water ever gone above the roadbed. It was in a position of safety against submergence by the inundation, its ruin resulting from the force with which the current of the inundating stream ran against the roadbed at that very spot and undermined it. The head of water that burst through the crevasse was 20 feet high, and rushed southward to where the car of oats stood, immediately in the line of flow, with a current of such strength as to wash away the roadbed. A mishap like that could be foreseen by no one. It was generally supposed the dike would not break, and, if a break might have been anticipated, it was impossible to know at what point it would happen. Much less could any one anticipate that the tide of the inrushing stream would sweep across the intervening bottom for a mile and a half, and endanger the car of oats by cutting away the roadbed. All that was necessary in the way of precaution, so far as human foresight could tell, was to put the car where the overflowing waters would not rise to it, which was done. It was in testimony that the stream of the overflow sapped the roadbed; and that this was the mode in which the loss occurred was physicially demonstrated by the fact that, of the sixteen cars on the same track this was on, only three fell into the water, and those three stood where the ground was washed from under the track. That the cause of the loss was the act of God appears clearly and unmistakably.

WIFE TESTIFYING AGAINST HUSBAND'S PARAMOUR IN ADULTERY CASES.

As to whether or not a wife is a competent witness to testify in criminal cases wherein a woman is tried alone for living in adultery with the husband of the wife, there is considerable conflict among the authorities. The most recent case upon the subject is that of Campbell v. State.[1] In this case Joe Campbell is indicted, tried and convicted for living in a state of adultery or fornication with Mary Calvin. It was upon the testimony of Island Calvin, the husband of the woman Mary Calvin, that the conviction was obtained. On appeal the supreme court in an opinion delivered by McClellan, C. J., said: "The witness' wife, Mary Calvin, though also indicted for living in adultery with this defendant, was not, as we have seen, indicted jointly with him, but separately, and she, of course, was not on trial with him. Testimony of the husband going to prove the unlawful cohabitation between his wife and the defendant against the latter on this trial could not, therefore, in any wise tend to prove the guilt of the wife under the indictment against her. Nor would the conviction of this defendant be *res ajudicata* or any evidence of the wife's guilt.[2] It is settled in this state that in such case the husband may testify on the trial of the party separately tried for an offense alleged to have been committed jointly by him and the wife.[3]

The case of Woods v. State,[4] cited by the chief justice, was an indictment for grand larceny, and was not a prosecution for living in adultery. In this case the husband was charged as being an accomplice of the defendants who were on trial. The court said: "Where, however, the husband is not a party to the record, whether by reason of a failure to indict him, or of the entering of a *nolle prosequi* against him, no reason is perceived why the testimony of the wife should be held incompetent in the prosecution of an accomplice of her husband.[5] The proceeding then becomes a *collateral* one, in which the interests of the husband cannot be judicially affected. And in such cases, where neither the husband nor the wife is a party defendant to the cause, so as to be directly interested, the testimony of either may be received, although its tendency is to criminate the other. The main reason is, that judgment of acquittal or conviction can not be used in evidence against or in favor of the husband or wife, as the case may be, in the event of their subsequent indictment and trial. It would be *res inter alios acta* as to them.[6] As said in State v. Briggs,[7] its effect, at most, would be only as information, and not as evidence against the husband, because it could not be used as evidence against him in a subsequent direct proceeding. Nor does the wife's admission as a witness violate the principles of public policy founded in the relation of husband and wife, "because she is not offered as a witness for or against him."[8] The broad rule, indeed, is asserted by Mr. Greenleaf, that where the grounds of defense are several and distinct, and in no way dependent on each other, no reason is perceived why the wife even of one defendant should not be admitted as a witness for a co-defendant.[9] And this doctrine is supported by Mr. Wharton, with the qualification, of course, that it shall not apply in cases where the acquittal of one defendant shall operate necessarily as the acquittal of the other.[10] Among the latter class of cases may be enumerated the offenses of riot, conspiracy, adultery, and the like.[11] The principle seems to be sound, and supported by authority, that in all such cases, where any co-defendant is admissible, his wife is also admissible the husband not being a party, nor otherwise directly interested.[12] We admit that there is a

[1] 133 Ala. 158.

[2] State v. Cutshall (N. Car.), 26 Am. St. Rep. 599.

[3] Woods v. State, 76 Ala. 35. See also Birge v. State, 78 Ala. 435.

[4] 76 Ala. 35.

[5] 1 Bishop, Cr. Proc. (3d Ed. 1880) sections 1019-1020.

[6] State v. Bridgman, 49 Vt. 202, 24 Am. Rep. 124; Moffit v. State, 2 Humph. (Tenn.) 99; 1 Greenl. Ev. section 342; 1 Archbold's Cr. Pr. & Pl. (Pomeroy) 472, *153, note 1; 3 Russell's Cr. (9th Ed.) 630*; State v. Briggs, 9 R. I. 361, 11 Am. Rep. 270.

[7] 9 R. I. 361, 11 Am. Rep. 270.

[8] Moffit v. State, 2 Humph. 99, 36 Am. Dec. 301, 303.

[9] 1 Greenl. Ev. sec. 335.

[10] Whart. Cr. Ev. sections 392, 445; United States v. Addate, 6 Blatchf. 76.

[11] Moffit v. State, *supra*.

[12] Whart. Cr. Ev. (8th Ed.) sections 391, 445; Bell v Coiel, 27 Am. Dec. 448.

conflict of authority in reference to this question, and there are well considered decisions adverse to some of the views which we here express. But the better opinion, with the growing tendency of later judicial decisions, is believed to be in harmony with the conclusions reached by us. We may add, that, where the testimony of husband or wife, even in a collateral matter, tends to criminate the other, while it will be admitted, it seems that it will not be compelled. The more reasonable view is to admit such testimony in all cases "where it cannot be used as an instrument of future prosecution, provided the witness be not compelled to testify."[13]

This opinion in the case of Woods v. State,[14] was as said above, not a case for living in adultery, where the defendant could be guilty only by proving the participation by the husband of the act, but was a case where it was possible to prove the defendant's participation in the act, without proving the husband's participation. The case of Campbell v. State,[15] failed to discuss in any manner whether or not there was any difference in such a class of criminal proceedings. From the case of Woods v. State, it would seem that there is such a distinction, but if so, it was overlooked and not considered in the case of Campbell v. State.

The case of Birge v. State,[16] cited in the Campbell case, was an indictment against two persons for living together in adultery, and upon the trial it was held that the husband of the woman is not a competent witness for the man where both are on trial together. The court, by Stone, C. J., said: "Husband and wife can not be witnesses for one another, nor regularly against one another; nor for or against any other person indicted and tried jointly with the husband or wife, for a joint offense. * * * This admissibility is based on general questions of social policy, and is not abrogated by the statutes, enabling a defendant to be examined in his own behalf."[17] The principle stated above is eminently applicable to the offense charged in this case

[13] 1 Whart. Cr. Ev. sections 432, 425; State v. Dudley, 7 Wis. 664; State v. Briggs, 11 Am. Rep. 270, *supra*.

[14] 76 Ala. 35.

[15] 133 Ala. 158.

[16] 78 Ala. 435.

[17] Whar. Cr. Law, section 767; Whar. Cr. Ev. section 400, and note 3; Wood v. State, 76 Ala. 35.

The offense cannot be committed without the concurring, guilty participation of the two defendants. If one is guilty, the other must be, although one may be acquitted for defect of proof, while the other is convicted on testimony which tends to criminate only the one. A confession would be testimony of this class. Any testimony tending to exculpate one defendant, must necessarily tend to exculpate the other. Positive testimony in favor of the one must, in the nature of things, be testimony in favor of the other."

The case of Fincher v. State,[18] was under an indictment for murder. The defendant introduced evidence tending to show the guilt of one Spencer, and that the defendant was not guilty. Spencer's wife was permitted to prove an alibi for her husband; the court said: "Mrs. Spencer was not an incompetent witness; nor was there any objection to her testifying to facts which repelled all suspicion of her husband's guilt of the murder, with which he had at one time been charged. Husband or wife are not parties to the record, and have no interest directly involved in the prosecution. The judgment of conviction or acquittal, could not become evidence for or against the one or the other, except so far as it would be evidence for or against other strangers to it.[19] The case of Powell v. State,[20] was under an indictment for arson, and the facts were very similar to the Fincher case, and the rulings of the court were the same. The case of Cotton v. State,[21] was where Bob Cotton and Martha Cox, were jointly indicted, tried and convicted for living in adultery. On the trial the court permitted the husband of Martha Cox to testify against Bob Cotton as a witness. On the appeal, the Supreme Court of Alabama, by Bricknell, C. J., said: "The common law excluded the husband and wife as a witness in any case, civil or criminal, in which either was a party. The principle of the rule required its application to all cases in which the interests of husband or wife were involved. Therefore, 'the wife is not a competent witness against any co-defendant, tried with her husband, if the testimony concern the hus-

[18] 58 Ala. 215.

[19] 1 Greenl. Ev. sections 241-342; 1 Phill. Ev. 71-72; Powell v. State, 58 Ala. 362.

[20] 58 Ala. 362.

[21] 62 Ala. 12.

band, though it be not directly given against him."[22] The reason for the exclusion is founded partly on the identity of interest and partly on consideration of public policy, which lie at the basis of civil society. The statute removing interest as a cause of excluding witnesses, and rendering parties competent, is by its terms, confined to suits and proceedings other than criminal cases.[23] In State v. Welsh,[24] it was held, that on the trial of an indictment against a man for the crime of adultery, the husband of the woman, with whom the crime is alleged to have been committed, is not a competent witness to prove the act of adultery. The court say: "If there is soundness in the reason, which is given in the books, for holding incompetent the husband or the wife to give, against each other, evidence, because it may be the 'means of implacable discord and dissension between them,' it is certainly difficult to perceive how that discord and dissension will fail to arise, when, in collateral proceedings, testimony should be given by one which charges directly upon the other the same crime, for the commission of which the party on trial is indicted." It was said by Parker, C. J., in Canton v. Bentley:[25] "It may well be doubted whether a husband can be a competent witness to prove a fact, which amounts to adultery on the part of the wife; and it would certainly be against good manners and common decency that such evidence should be admitted." The wife and her accomplice in guilt were jointly indicted and tried. The husband was surely incompetent to testify against the wife, and was also incompetent to testify against her accomplice.

Let us now discuss the proposition as to whether or not there is any distinction drawn in cases where a husband or wife in collateral cases is excluded from testifying against the defendant, where the defendant can only be found guilty by proving the participation by the husband or wife. On a trial for living in adultery, from the nature of the charge a conviction of one party necessarily establishes an illicit intercourse between the parties.

In the case of State v. Welsh,[26] the question was presented as to whether the husband of the woman with whom defendant was alleged to have committed the crime of adultery, was a competent witness to testify to the act of adultery. The court said: "The defendant is indicted for the crime of adultery, and the question is, whether the husband of the woman with whom it is alleged to have been committed, is a competent witness to testify to the act. Neither the husband nor wife of the party is competent to give evidence against such party. The reason for the exclusion is founded partly on the identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice.[27] It has been resolved, that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissension between them, and the means of great inconvenience."[28] But though the husband and wife are not admissible as witnesses against each other, when either is directly interested in the event of the proceedings, whether civil or criminal, yet in collateral proceedings not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate or contradict the other, or may subject the other to a legal demand.[29] In the case of the King v. Cliviger,[30] it was decided, that the husband and wife could not be admitted to give any evidence which tended to the crimination of the other in collateral cases. But in a late case of The King v. Inhabitants of All Saints,[31] the case of The King v. Cliviger was referred to, and the rule therein underwent some discussion, and the court were of the opinion, that it had been expressed much too general and undefined; and they held that a woman might testify, when her testimony did not directly criminate the husband in proceedings which related to other matters, and not to any criminal charge against him, nor never could be used against him, nor could he ever be affected by the judgment of the court

[22] 1 Greenl. Ev. sections 334-35.
[23] Code of 1876, sec. 3058.
[24] 13 Shep. (26 Me.) 30.
[25] 11 Mass. 441.
[26] 13 Shep. 26 Me. 30, 45 Am. Dec. 94.
[27] 1 Ph. Ev. 64.
[28] Co. Lit. 6 b.
[29] Greenl. Ev. sec. 342.
[30] 2 T. R. 263.
[31] 6 Man. & Sel. 194.

founded upon such evidence. When neither the husband nor the wife is a party to a suit, nor interested in the general result, the husband or wife is competent to prove any fact, provided the evidence does not directly criminate the other.[32] On an indictment for adultery the husband of the woman with whom the crime is alleged to have been committed, cannot be a witness for the prosecution.[33] In Canton v. Bentley,[34] Parker, C. J., uses the following language, though the decision of the cause did not ultimately turn upon the doctrine expressed: "It may well be doubted whether a husband can be a competent witness to prove a fact which amounts to adultery on the part of the wife; and it certainly would be against good manners and common decency that such evidence should be admitted." If there is any soundness in the reason which is given in the books, for holding incompetent the husband or the wife, to give against each other, evidence, because it may be the means of implacable discord and dissension between them, it is certainly difficult to perceive how that discord and dissension will fail to arise, when in collateral proceedings, testimony should be given by one, which charges directly upon the other, the same crime, for the commission of which the party on trial is indicted. On principle and authority we think the witness incompetent."

In the case of Commonwealth v. Sparks,[35] the same question arose, and the Supreme Court of Massachusetts, after referring to the cases of King v. Cliviger[36] and King v. All Saints,[37] said: "It has never been determined that a husband or wife is admissible as a witness in any collateral proceeding, to testify directly to the commission of any criminal act of the other. Nor ought such testimony in any proceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded. It was so expressly determined in the case of State v. Gardner.[38] The same question arose directly in the case of State v. Welch,[39] where the husband of the woman with whom the defendant was, in the indictment against him, alleged to have committed the crime of adultery, was admitted as a witness, and testified that, having suspicions of a guilty intercourse between the parties, he entered his own house by night secretly and found them asleep in bed together. But the court, after reviewing the authorities, and upon full consideration of the principle by which the admission or exclusion of such parties as witnesses against each other is regulated, determined that the testimony of the husband had been erroneously admitted, and ordered that the verdict which had been rendered against the defendant should for that cause be set aside." A majority of the court are of opinion that that determination, which does not appear to be in conflict with the decision of any court of competent authority and final jurisdiction, was accurate and just, and constitutes a precedent which it is right to follow and sustain."

In the case of State v. Wilson[40] the alleged guilty parties were jointly indicted for adultery. The woman was first tried and acquitted, and upon a trial of her alleged paramour, the husband of the woman was offered as a witness to prove that he had come upon the defendant and his wife *in flagrante delicto*. The court upon a review of the authorities held, that he was not competent to give such testimony.

In the case of Moffit v. State,[41] which was cited in the case of Woods v. State,[42] William Moffit and James Moffit and James Taylor, were jointly indicted for assault and battery. A severance was obtained and the Moffits were tried separately from Taylor, and on the trial of the Moffits, Taylor's wife was offered as a witness in their behalf. The court said: "It is true the husband and wife are in general incompetent witnesses, either for or against each other, on the ground partly of policy and partly of identity of interest. It is well settled moreover, that when the husband is on trial with others, jointly

[32] 2 Stark. Ev. 709.
[33] State v. Gardner, 1 Root, 485.
[34] 11 Mass. 441.
[35] 7 Allen (Mass.), 534.
[36] 2 T. R. 263.
[37] 5 M. & S. 194.
[38] 1 Root, 485.
[39] 26 Me. 30.
[40] 31 N. J. L. 71.
[41] 2 Humph. 99, 36 Am. Dec. 301.
[42] 76 Ala. 35.

indicted with him, the wife is not a competent witness to testify on behalf of those others, although her testimony may not relate to her husband; because, being brought in conflict with witnesses who testify as to the guilt of all, the tendency of her testimony, under such circumstances, might confer some benefit on her husband, the jury being probably unable to weigh the testimony properly, according to its just bearing on the different defendants. It has also been determined, that the wife of a defendant, jointly indicted with others for a riot, conspiracy, or other offense, in which the guilty participation of some specified number is made necessary by law, is not competent to testify on behalf of the other defendants, although tried separately from her husband, because the consequence of their acquittal in such case might be to exonerate her husband from the charge."

The case of State v. Briggs[43] was a proceeding against the defendant, for procuring an abortion upon one Mary Fisher. The court in the opinion said: "The first two exceptions are based on the following grounds, to-wit: That the said Mary Jane Fisher was, at the time of the alleged offense, a single woman, having never been married; that she afterwards intermarried with one Edwin A. Hackett; that said Hackett was the person by whom she was got with the child for whose miscarriage she was operated on; that said Hackett employed the defendant to perform the operation, and came to him with the said Mary Jane for the purpose of having it performed; that on the trial of the defendant in the court below the said Hackett and his wife were called on as witnesses for the government, and admitted to testify against the objection of the defendant—the objection being that the testimony of each of them would tend to incriminate the other of an indictable offense—that is to say, her of the offense of fornication, on him of the participation in the offense for which the defendant was indicted. The question as to how far the testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, is not satisfactorily settled by precedent. In the case of The King v. Cliviger,[44] it was thought that such testimony was inadmissible from reasons of public policy, to avoid dissensions between husband and wife. That was a case of a settlement, where a marriage in fact had been proved, and the husband having given testimony denying a previous marriage, it was held that the first wife could not be called to prove the same, as it would tend to criminate him in respect of two crimes—bigamy and perjury. But in two cases subsequently decided, where the question was the same, except that the husband had not given testimony denying his previous marriage, it was held that the first wife was a competent witness to prove such previous marriage.[45] In these two cases, the rule declared in The King v. Cliviger may be regarded as having been qualified, at least so far as to recognize the competency of husband and wife as witnesses in collateral cases, where the testimony of one of them is called as a witness can criminate the other only when connected with other evidences. Indeed, the language of Tenterden, C. J., in Rex v. Bathwick, is consistent with the admission of such testimony collaterally to any extent, provided that no use can afterward accrue therefrom in a direct proceeding.[46] In the case of State of Wisconsin v. Dudley,[47] on the trial of an indictment for adultery committed by the defendant with the wife of a man who had subsequently procured a divorce, it was held that the divorced husband was a competent witness to prove his marriage with his divorced wife. In State v. Marvin,[48] on a similar indictment, the husband testified, without objection, to the marriage and to the fact of the adultery; but, being asked if he lived with his wife at the time of the trial, answered that he did not. To this last statement the defendant objected, but the objection was overruled, and it was held, on a motion to set aside the verdict, to have been properly admitted. We find no American decision, with the exception of the

[43] 9 R. I. 361, 11 Am. Rep. 270.

[44] 2 Term. 263.

[45] The King v. All Saints, 6 M. & S. 194; Rex v. Bathwick, 2 B. & Ad. 639.

[46] See Roscoe's Crim. Ev. 118 and 144; 1 Greenl. Ev. sec. 242, and 1 Phillips on Ev. 84, 85, in which, however, it is stated that in King v. Gleed, 2 Russ. Crimes, 983, the rule of exclusion was applied, though Rex v. Bathwick was cited in the case. And see also remarks of Earle, J., in Stapleton v. Croft, 10 Eng. L. & Eq. 461, 462.

[47] 7 Wis. 664.

[48] 35 N. H. 22.

two above stated (if they can be deemed an exception), which sanctions the unqualified admissibility of such testimony in a collateral proceeding. It has been decided in four different states, that on the trial of an indictment against a man for adultery, the husband of the woman with whom the crime is alleged to have been committed is not a competent witness to prove the fact.[49] In the last named case, Merrick, J., in delivering the opinion of the court said: "It has never been determined that a husband or wife is admissible as a witness in any collateral proceeding to testify directly to the commission of any criminal act of the other. Nor ought such testimony to be received in any proceeding or upon any trial; for, as nothing would be more likely to exasperate the parties and be the means of implacable discord and dissension between them, its admission would be a violation of that principle of public policy upon which the general rule of their exclusion as witnesses against each other is founded."[50] "In the State v. Wilson and Wagner,[51] it was held that the husband was not a competent witness on the trial of an indictment against a man for adultery with his wife, even after the acquittal of the wife, who had been jointly indicted with the accused. We may remark of the class of cases to which the case last cited belongs, that it may be doubted whether, as a matter of fact, it would often happen, after the adultery of the wife, that there would be much marital harmony to be endangered by the testimony of the husband against her paramour. Some of these cases recognize the distinction suggested in the case of Rex v. All Saints and Rex v. Bathwick, between testimony which is directly criminative, and that which is criminative only when connected with other testimony, a husband and wife being deemed competent witnesses to give testimony, in collateral cases, which relate to the other, when it is of the latter, but not when it is of the former description. But upon principle we find no satisfactory ground for distinction. The supposed disqualification of husband and wife to give, in collateral cases, testimony directly criminative of each other, is said to rest upon the policy of avoiding dissensions between husband and wife; and, if so, the disqualification ought to be complete, for such dissensions, differing only in degrees of virulence, would be likely to result from testimony which tends to criminate, as well as from that which is directly criminative. There are logically only two alternatives, either to exclude the testimony entirely, or to admit it to any extent in collateral proceedings, provided that no use can afterwards accrue therefrom in any direct proceeding. We think it the better rule, subject to such proviso, to admit the testimony. We think the language used by at least one of the judges, in Rex v. All Saints, and by Lord Tenterden, in Rex v. Bathwick, is open to the inference that they would have gone as far if these cases had required it. There are cases in which the interests of justice seem to require that such should be the rule. Neither can we perceive that any special mischief will be likely to result from it; for the testimony, being given in a collateral proceeding, could have effect only as information against the husband or wife, there being no contradiction between them, and there is but slight reason for supposing that the witness would willingly communicate under oath any information which would otherwise be withheld. Generally, indeed, it is pretty well known, either from the witness himself, or otherwise, what he can testify before he takes the stand. If we accord to the witness the privilege of objecting to testify on the ground that the testimony, if given, will criminate, or tend to criminate, a husband or wife, we think that, in a proceeding which can never be used against the husband or wife, there is no sound principle of public policy which requires that we should go still further, and put it in the power of a third person, by objecting when the witness does not object, to defeat, it may be, a just claim, or escape a merited punishment. We concur in the opinion expressed by Mr. Justice Bailey, in Rex v. All Saints, that a husband or wife, objecting to give such testimony, would be entitled to the protection of the court. The case at bar presents some peculiarities which, even if the true rule be that which is contended for on the part of

[49] State v. Gardner, 1 Root (Conn.), 485; State v. Welch, 26 Me. 30; State v. Wilson, 31 N. J. 77; Commonwealth v. Sparks, 7 Allen, 534.

[50] And see also Canton v. Bentley, 11 Mass. 441; Stein v. Bowman, 13 Pet. (U. S.) 209; Stewart v. Johnson, 3 Harrison (N. J.), 89; People v. Horton, 4 Mich. 87, Mich. Dig. sec. 1665.

[51] 31 N. J. 77.

the defendant, might lead us to question its applicability. It is a case in which the husband and wife were both witnesses, and both, so far as appears, willing witnesses, and in which each testified to the facts which are claimed to make the testimony of the other inadmissible. It is not, therefore, a case in which either can properly make the testimony of the other a ground for conjugal dissension; and consequently it might be urged that the case is not within the rule, as the same is contended for on the part of the defendant, inasmuch as it is not within the reason of the rule, *ratione cessanti, cessat ipsa lex*. If, however, the case is not an exception to the rule, but an example under it, it is an example which aptly exemplifies its irrationality in some of its applications. But we think the true rule is not in accordance with the defendant's claim, but in accordance with the opinion which we have previously expressed, and that, accordingly, the testimony of Edwin Hackett and Mary Jane Hackett was admissible on the trial of the indictment against the defendant."

The case of State v. Bridgman,[52] was where the defendant Bridgman, was indicted for living in adultery with Chastina Warren. The husband of the said Chastina Warren, was a witness against the defendant. In the opinion the court said: "There is no doubt but that in the early history of the common law, husbands and wives were, on ground of supposed public policy, strictly excluded from testifying to any facts that would even only tend to criminate each other, whoever might be on trial, except in some cases where wives were, from necessity, permitted to testify against their husbands for their personal protection.[53] Many difficulties grew out of the strictness of this rule, and in Rex v. All Saints,[54] it was essentially modfiied, and the testimony of the wife admitted, although it tended to show that the husband was guilty of bigamy. The Court of King's Bench held in that case, that the evidence was admissible, since it did not directly criminate the husband, and could not afterwards be used against him, normade the groundwork of any future prosecution."

"This doctrine, although contrary to the former rule, became settled in England.[55] And evidence of the husband or wife that did not directly but only tended to criminate the other, was not excluded, on the ground of public policy. This rule seems to have been followed by several cases and some authors in this country. In State v. Gardner,[56] the husband was offered, as the case states, to prove the *fact* of adultery with the wife and excluded.[57] In State v. Welch,[58] the husband, as the case is stated in the opinion, was admitted on the trial below, to testify to the *act* of adultery with the wife; and it was held that this was error, and the judgment was reversed, as it directly criminated her; but the rule, that he might testify to what would only *tend* to criminate her, in collateral cases, was recognized. This is stated to have been the rule in Stewart v. Johnson,[59] and may have been the one followed in Commonwealth v. Gordon,[60] although it does not expressly appear that it was. In Best's Ev. (Wood's Ed.), 311, it is said that the rule only applied where the husband or wife was party to the suit in which the other was called as a witness, and did not extend to collateral proceeding between third parties. And in Cowen and Hill's notes to 1 Phil. Ev. *89, it is laid down that even the wife is receivable to show the criminality of the husband, except in cases where her evidence would influence a suit or prosecution against him. And there are many

[52] 49 Vt. 202, 24 Am. Rep. 124.

[53] Co. Litt. 66: Rex v. Cliviger, 2 T. R. 263. In 2 Stark. Ev. 709, it is stated: "It has indeed been said, that the rule applies to all evidence which tends collaterally, and by its connection with some other circumstances, to criminate the husband or wife of the witness, although the fact itself, abstractly considered, involves no criminality, because it may lead to a criminal charge and to the apprehension of the other; and, therefore, that if the evidence tend to criminate the other, it is not admissible." And referring to Rex v. Cliviger, he says the rule there seemed to have been carried further than principle would warrant, as the evidence induced no breach of that confidence between married persons that ought to be held sacred, and that neither evidence nor any decision upon it could be afterwards used against the other party.

[54] 6 M. & S. 194.

[55] Roscoe's Cr. Ev. 114; 2 Stark. Ev. 711.

[56] 1 Root, 485.

[57] In 1 Greenl. Ev. sec. 342, it is said: "But though the husband and wife are not admissible as witnesses against each other, when either is directly interested in the event of the proceedings, whether civil or criminal, yet, in collateral proceedings, not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may tend to criminate, or may contradict the other, or may subject the other to legal demand."

[58] 26 Me. 30.

[59] 3 Harr. (N. J.) 87.

[60] 2 Brewster's Cas. (Penn.) 569.

adjudged cases that seem to have gone upon the ground that the husband or wife should be excluded only when the other is a party. In Commonwealth v. Easland,[61] the respondent being on trial on a joint indictment against him and four others for an assault, Strong, Sedgwick, Sewall, and Thatcher, JJ., said they would try the others separately, to permit his wife to testify for them. And in State v. Athony,[62] the respondent had been tried separately on a joint indictment against him and son for murder, and the testimony of the son's wife, offered by him excluded. The court reversed the judgment, to permit her to testify, as Nott, J., six others concurring, said: "For both being principals, and each individually responsible for the part which he took in the transaction, the conviction or acquittal of one could be no evidence of the guilt or innocence of the other." In Moffit v. State,[63] there was an indictment against five, two of whom were on trial for an assault, and another was one Taylor, who had not been tried. The witnesses for the state had testified that the prosecutor was taken out of bed, carried to a forest, bound to a tree, and severely scourged with rods by five disguised men, and that two of them were the respondents. Taylor's wife was then offered as a witness for the respondents, and excluded, and the respondents appealed. The judgment was reversed for that exclusion on the ground that the husband had no direct interest in the event of that trial, and that a judgment of acquittal or conviction of the respondents on that trial could not be used on his. The testimony of the husband to the fact of adultery with the wife can be excluded only on the ground of public policy, and not because the respondent had any right to commit adultery with the wife in presence of the husband, or because such adultery would be innocent. And in the note to Phil. Ev., before cited, it is said that the notion of the testimony of husbands and wives being inadmissible from policy seems to be pretty much given up in England. In State v. Marvin,[64] on the trial of an indictment for adultery against the man, the husband of the woman testified to the fact without objection being made. Afterward objection was taken to further testimony of the husband, but it was admitted, and held on review in the higher court to be admissible, without any intimation that the whole was not admissible. And in State v. Rood,[65] on trial of the man for an offense under the Blanket act, the husband of the woman was admitted to testify to his marriage with the woman, and no objection was raised. In this case, the respondent, Bridgman, was indicted separately and on trial separately, so far as he had any right to raise this question, and the question arising on his exception is the only one under review as to this part of the case. His trial was, as to the wife of the witness Warren, wholly a collateral proceeding. No judgment of conviction or acquittal in it could be used against or for her, nor in any way directly affect her. The circumstances testified to by her husband did not directly criminate her. Alone they were innocent enough, and of no importance except by proof of other circumstances, and the combination of these circumstances with the others. If the ancient rule was to be applied here, the admission of this testimony would be found to be erroneous. But by the rule as at first modified in England, and as it has been almost universally recognized in this country, the testimony received was admissible."

This case would not support the opinion in Campbell v. State,[66] where the court did not draw the distinction as to *direct* evidence by the husband to the act of adultery by the wife, and evidence merely *tending* to show criminal intimacy by the wife.

The case of Cornelius v. Hamboy[67] was a civil action by a husband for damages for debauching plaintiff's wife. The court said: "The counsel for the defendant objected to the competency of the plaintiff as a witness. He was called to prove the criminal intercourse of his wife with the defendant; in other words to prove her adultery. It is true, his wife was not a party to the record, but the object and effect of his testimony was to criminate her. I am not aware that any of our acts of assembly enlarging the competency witnesses permit husband and wife to testify against each other, except in case of personal

[61] 1 Mass. 15.
[62] 1 McCord, 285.
[63] 2 Humph. (Tenn.) 99.
[64] 35 N. H. 28.
[65] 12 Vt. 396.
[66] 133 Ala. 158.
[67] 150 Pa. St. 364, 24 Atl. Rep. 515.

injuries inflicted by the one upon the other, and in certain cases of divorce; and the rule which excluded such testimony does not depend upon the party criminated being a party to the record. The principle of the rule which excluded husband and wife from testifying against each other requires its application to all cases in which the interests of the other party are involved; and therefore the wife is not a competent witness against any co-defendant tried with the husband if the testimony concern the husband, though it be not directly given against him. Nor may she, in such a suit between others, testify to any matter for which, if true, her husband may be indicted.[68] The fifth section of the act of 23rd of May, 1887, (P. L. 158) provides: "Nor shall husband and wife be competent or permitted to testify against each other, except in those proceedings for divorce in which personal service of the subpoena or of a rule to take depositions has been made upon the opposite party, or in which the opposite party appears and defends, in which case either may testify fully against the other; and except, also, that in any proceedings for divorce either party may be called merely to prove the fact of marriage." The rule that husband and wife shall not testify against each other extends, as before observed, to testimony by the one which tends to criminate the other, although not a party to the suit. The reason for it is the disturbance of the marital relations which would result from the admission of such testimony. This is the settled rule of the common law, and it has not been changed by any act of assembly, or by any decision in this state. We are of opinion that it was error to permit the husband to testify in this case. He was an incompetent witness. The issue, and the only issue, involved the adultery of his wife. It was not competent for him to forge a single link in the chain of circumstances pointing to his wife's criminal conduct, and upon any other subject his testimony would have been irrelevant."

In a syllabus by the Supreme Court of Georgia in Howard v. State,[69] it was said: "The crime of adultery and fornication being one in which the woman is necessarily guilty as well as the man, the husband of the woman is an incompetent witness against the man to prove the act of adultery and fornication, although by statute, persons accused of this offense must be severally indicted, and although the acquittal of the one will not operate to acquit the other."

Two eminent authorities have taken diametrically opposite views of this question. Mr. Hughes says: "The husband of the woman with whom the offense of adultery was committed by the accused is not a competent witness to prove the fact."[70]

Mr. Underhill in his work on Criminal Evidence, page 235, takes an opposite view and says: "Whether a husband or wife is competent to testify as a witness upon the trial of a third person for a crime (where the spouse of the witness is not a party to the record), if his or her testimony may incriminate the other party to the marriage relation, is a question which was formerly much discussed. It was at one time almost universally held that such evidence, though it only tended to incriminate collaterally and in connection with other circumstances, was inadmissible. But the rule is now well settled that this evidence is to be received, not only as to those facts which, though innocent in themselves, constitute links in a chain of proof which will implicate the husband or wife of the witness, but also as to those facts which are directly incriminating, always provided the spouse of the witness is not a party to the record."

In conclusion it may be said that if the rule is one of evidence founded upon reasons of public policy, then the state should not be permitted to avoid the effect of the rule by returning separate indictments in adultery cases.

EDWARD W. FAITH.

Mobile, Ala.

[68] 1 Greenl. Ev. 334, 335; Pringle v. Pringle, 59 Pa. St. 281; Stewart v. Johnson, 18 N. J. Law, 89; Stein v. Bowman, 13 Pet. 209; Kelly v. Drew, 12 Allen, 107.

[69] 94 Ga. 587, 20 S. E. Rep. 426.

[70] State v. Wilson, 31 N. J. L. 77; State v. Gardner 1 Root (Conn.), 485; State v. Welch, 26 Me. 30; Hughes on Criminal Law & Procedure, section 3001.

DAMAGES—EXPENSE OF NURSING—CARE BY DAUGHTER.

KAISER v. ST. LOUIS TRANSIT CO.

St. Louis Court of Appeals, December 13, 1904.

An injured person may recover the reasonable value of nursing given him by a widowed daughter, who lived with him, although there was no express contract between him and such daughter that she should be compensated.

GOODE, J.: This plaintiff got a verdict for injuries received in boarding one of the defend-

ant's street cars by the premature starting of the car before he had obtained a secure footing on it. The physician who attended him testified as to the condition the plaintiff was in when last examined, and that he was suffering then from a concussion of the spinal cord and brain. He was asked if it was a permanent injury, and said he could not answer that question, because he had not examined the patient lately. The physician stated the visible symptoms resulting from the injury to the spinal cord, chief of which was plaintiff's inability to bend or stoop. The physician was then asked what the plaintiff's chance of recovery was if that condition existed at the time of the trial. He answered that he thought there was not much chance for a complete recovery. The defendant objected and excepted to the question, for the reason that the doctor had said already that he could not predict as to the likelihood of a permanent injury, not having examined the plaintiff lately. Now, the plaintiff himself testified that his condition at the time of the trial remained as it was when the doctor last examined him, and we think the hypothetical question as to the chance of recovery, if he was still in the same state, was a fair one.

During the confinement due to his injuries plaintiff was nursed by his wife and widowed daughter, who lived with him. The daughter was permitted to testify as to the reasonable value of the nursing, and this is assigned for error on the ground that the nurses were members of the household and of his family, and, in the absence of an express contract to compensate them, their services are presumed to have been rendered gratuitously; therefore, the plaintiff could not recover their value as part of his damages. There is a conflict in the cases on this subject, and we find a decision in the Pennsylvania Reports that nursing under such circumstances cannot be taken into consideration as an element of damages in an action by the injured party. Goodhart v. R. R., 177 Pa. 1, 35 Atl. Rep. 191, 55 Am. St. Rep. 705. But the weight of authority is the other way, and we have found the following decisions affirming the right of the injured party to recover the reasonable value of the nursing he received, though it was from members of his family, and rendered gratuitously: Brosman v. Sweetser, 127 Ind. 1, 26 N. E. Rep. 555; Varnham v. Council Bluffs, 52 Iowa, 698, 3 N. W. Rep. 792; Missouri, etc., R. R. v. Holman, 15 Tex. Civ. App. 16, 39 S. W. Rep. 130; Crouse v. R. R., 102 Wis. 196, 78 N. W. Rep. 446, 778; Copithorne v. Hardy, 173 Mass. 400, 53 N. E. Rep. 915. Joyce, in his work on Damages, says: "Although the services in nursing are gratuitously rendered by a member of the family, there may be a recovery of the fair value of the services, and the value of the wife's services may be recovered;" citing in support of that text the cases we have cited above. 1 Joyce, Damages, § 256. In the same section the conflict of authority is noticed in these words: "In some cases, however, it has been held that, in the absence of an express contract to pay for services of wife or child in nursing a person who has suffered a personal injury, there can be no recovery therefor;" citing the Pennsylvania case and Peoria, etc., Ry. v. Johns, 43 Ill. App. 83. The case of Trapnell v. Red Oak Junction, 76 Iowa, 744, 39 N. W. Rep. 884, seems to sustain the right to recover such damages. The precise question was decided in this state in Murray v. R. R., 101 Mo. 236, 13 S. W. Rep. 817, 20 Am. St. Rep. 601. That plaintiff was permitted by the trial court to recover the reasonable value of the attention and nursing given to him by "ladies about the house" (presumably relatives), the opinion says. The Supreme Court approved the ruling. The case was overruled in Cobb v. R. R., 149 Mo. 609, 50 S. W. Rep. 894, but not on the point in hand. The point ruled to have been erroneously determined was that no expert proof of the reasonable value of the services was necessary, as their value was within the knowledge of men generally. In Smith v. St. Joseph, 55 Mo. 456, 17 Am. Rep. 660, it was ruled that in an action by a husband for a negligent injury to his wife the husband might not only recover the expense paid out for the nursing of his wife, but the reasonable value of his own attention to her. In Frick v. R. R., 75 Mo. 542, a father was permitted to recover for his care and trouble in nursing his injured son. To the same effect are Buck v. R. R., 46 Mo. App. 555, and Dunn v. R. R., 21 Mo. App. 188. In these cases the recovering plaintiff was not the injured party, but the husband or father of the party injured. They are certainly authority for the proposition that the ministrations of a father to his injured wife or child, given as a duty incident to the family relation may be recovered for in his action for damages sustained because of a negligent injury to his wife or child. The rule prevails that, where services are rendered by one member of a household to another, they are presumed, in the absence of proof of a special agreement to compensate for them, to be gratuitously given. The gift, however, is to the sufferer, and not to the *tort feasor*, according to reason and to most of the cases dealing with the question. If the plaintiff's wife and daughter nursed him because he was the head of the family, it can not fairly be supposed they were doing so for the benefit of the defendant. Plaintiff would have required the attendance of a paid nurse if his wife and daughter had not nursed him, and we think the gratuity was to him, and that he is entitled to the benefit of it, rather than the defendant. The weight of authority bears out that view.

NOTE.—*Expenses of Nursing as an Element in Estimating Damages—In General.*—It is a well known rule that in an action for personal injuries, plaintiff may be allowed expenses of nursing when there is evidence of his having been nursed and cared for by persons not members of his family, though no estimate has been given of the amount incurred by reason thereof. Chicago, etc., R. R. v. Holland, 122 Ill. 461, 13 N. E. Rep. 145; Hullehan v. Railroad, 68 Wis. 520, 32 N. W. Rep. 529; Hart v. Railroad, 33 S. Ca

427, 12 S. E. Rep. 9, 10 L. R. A. 794; Hawes v. O'Rielly, 126 Pa. St. 440, 17 Atl. Rep. 642; Holyoke v. Railroad, 48 N. H. 541; Sanford v. Inhabitants of Augusta, 32 Me. 536. Nor in an action for personal injuries, is it any defense to a claim for moneys paid a nurse that the plaintiff had a family capable of taking care of him; and evidence of that fact is inadmissible. Kendall v. City of Albia, 73 Iowa, 241, 34 N. W. Rep. 833.

Services Rendered by Members of Family. — But suppose the injured person is nursed by members of his own family bound to do such service by all the ties of blood and kinship, and even under pressure of obligation assumed by themselves or imposed by society,—under such circumstances can recovery be had for the value of such services. There seems to be some conflict among the authorities on this question. Thus, one line of authorities hold that in an action for personal injuries, plaintiff cannot recover, as expenses incurred, the value of services of members of his family in nursing him, in the absence of an express agreement on his part to pay therefor. Goodhart v. Pennsylvania Railroad, 177 Pa. St. 1, 35 Atl. Rep. 191. Thus, in an action against a railroad company to recover for injuries alleged to have been sustained through the negligence of its employee, it was held error to have admitted evidence of the value of services rendered plaintiff by her daughters, who made no charges for their services. Chicago, etc., R. R. v. Johnson, 24 Ill. App. 468. So also in a later decision by the same court it was held that under Starr & C. Annot. St. ch. 68, § 8, providing that "neither husband nor wife shall be entitled to recover any compensation for any labor performed or services rendered for the other," a husband was not liable for the services of his wife in nursing him during his recovery from a railroad accident, and that, therefore, in an action against the railroad company for the injuries received in such accident, he cannot recover the value of his wife's said services. Peoria, etc., R. R. v. Johns, 43 Ill. App. 83. See also Peterson v. Oleson, 47 Wis. 131; Dunkwater v. Dinsmore, 80 N. Y. 390, 393; Reed v. Railroad, 8 Am. & Eng. R. Cas. 180; Owen v. Railroad, 155 Pa. St. 334; Wallace v. Railroad, 41 Am. & Eng. R. Cas. 212, 215; Chicago, etc., R. R. v. Holland, 30 Am. & Eng. R. Cas. 590; Coleman v. Burr, 93 N. Y. 17, 25; Thompson, Negligence, 1258, § 44.

The weight of authority however seems to be the other way. Thus, it has been held that where the injuries of the husband inflicted through the negligence of another, render necessary extra services to him on the wife's part, the fact that it is his right to receive such services, and the wife's duty to render them, will not preclude him from recovering compensation therefor, as an element of his damages. Missouri, etc., R. R. v. Holman, 15 Tex. Civ. App. 16, 39 S. W. Rep. 130. To same effect, Crouse v. Railroad, 102 Wis. 196, 78 N. W. Rep. 446, 778, where the following remark of the trial court was approved: "The defendant company is not entitled to the services of a man's wife, and her services belong to her husband, as disclosed by the evidence here. If she has been compelled to nurse him in consequence of the injury, I see no reason why it is not a proper charge." The Supreme Court of Wisconsin in approving this remark of the trial court, said: "We think there is no error in this ruling. The authorities are not uniform on the subject, but we think the court's ruling sustained by the better reason. The defendant should not be allowed to profit by reason of the loving care of the wife." See also to same effect: Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. Rep. 555; Murray v. Railroad, 101 Mo. 236, 13 S. W. Rep. 817, 20 Am. St. Rep. 601; Varnham v. Council Bluffs, 52 Iowa, 698, 3 N. W. Rep. 792; Copthorne v. Hardy, 173 Mass. 400, 53 N. E. Rep. 915.

Husband's Services to Wife or Child.—Where a husband is compelled to nurse his injured wife the question presented is changed somewhat by the fact that in this case there is an actual loss to the husband in his earning capacity in proportion to the time he loses from his business. In such cases the mooted question is whether the husband shall receive the value of his services as a nurse or for the injury to his earning capacity. The general rule is that the damages to which a man is entitled, for nursing his wife and doing her work while she is suffering from injuries caused by the negligence of another, are the value of the service of a competent servant to perform the same duties, and not the amount of wages which he might have earned by working at his trade. Hogard Powder Co. v. Volger, 58 Fed. Rep. 152, 7 C. C. A. 130; Town of Salida v. McKinna, 16 Colo. 623, 27 Pac. Rep. 810. But see Pullman Palace Car Co. v. Smith, 79 Tex. 468, 14 S. W. Rep. 993, 23 Am. St. Rep. 356, 13 L. R. A. 215, where it was held that the husband was entitled to recover for time necessarily lost while attending his wife during her sickness, and may give evidence of the salary he was earning at the time.

In the case of attendance upon children the rule has been applied differently. Thus, in an action by a father to recover expenses incurred in nursing his infant daughter, who was injured through defendant's negligence, it was error to allow him to testify that, in order to nurse his daughter, he was obliged to abandon an engagement as theatrical manager at a salary of $50 a week. Barnes v. Keene, 132 N. Y. 13, 29 N. E. Rep. 1090.

HUMOR OF THE LAW.

This story regarding James Jeffrey Roche is taken from the Springfield Republican:

On a recent visit to the White House, the President, so it is said, was chaffing with Roche about the places he was going to have after election.

"Jeffrey," the President is reported to have said, "I am going to appoint you minister to the Court of St. James."

"God save the king!" exclaimed Roche, and the two enjoyed the joke immensely.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ADMIRALTY—Interest on Claim.—The allowance of interest on an adjustment of conflicting claims in admiralty is discretionary with the court.—The Eliza Lines, U. S. C. C. of App., First Circuit, 132 Fed. Rep. 242.

2. ADVERSE POSSESSION—What Constitutes.—Hostile entry and commencement of improvement, plainly indicating a purpose to lay out and improve a lot in territory suitable for cheap residence lots, held proper basis for finding of disseisin of true owner, under Rev. St. 1898, § 4214, subd. 2.—Illinois Steel Co. v. Jeka, Wis., 101 N. W. Rep. 399.

3. ALIENS -Marriage, Chinese Female Wrongfully in United States.—The marriage of a Chinese female improperly allowed to enter the United States, not shown to have been in good faith, held no defense to deportation proceedings.—United States v. Ah Sou, U. S. D. C., D. Wash., 132 Fed. Rep. 878.

4. APPEAL AND ERROR—Abandonment of Case, Issues Made by Pleadings.—Where, on argument on appeal, plaintiff abandoned and admitted away the case made by the pleadings, the judgment for him will be reversed.—Sartor v. Smith, Iowa, 101 N. W. Rep. 515.

5. APPEAL AND ERROR—Burden of Proving Absence of Fraud.—Where, in an action for broker's commissions, plaintiff admitted that he altered the contract of sale, the burden of proof that such alteration was not fraudulent was on him.—Robertson v. Vasey, Iowa, 101 N. W. Rep. 271.

6. APPEAL AND ERROR—Dismissal, Discretion to Permit.—Unless it clearly appears that some fundamental rule of a court of equity was violated, or that there was an abuse of legal discretion, a decree dismissing a cause on complainant's motion will not be reversed on appeal.—Penn Phonograph Co. v. Columbia Phonograph Co., U. S. C. C. of App., Third Circuit, 132 Fed. Rep. 808.

7. APPEAL AND ERROR—Erroneous Reason Assigned for New Trial.—An order granting a new trial will not be reversed because the trial judge assigned a wrong reason for it.—Davis v. Dinnie, N. Dak., 101 N. W. Rep. 314.

8. APPEAL AND ERROR—Jurisdiction of Lower Court.—An appellate court may determine, not only its own jurisdiction, but that of the court from which the appeal is taken.—Rhyne v. Manchester Assur. Co., Okla., 78 Pac. Rep. 528.

9. APPEAL AND ERROR—Saving Questions for Review.—To save any question for review on a ruling excluding testimony, the party must state what is proposed to be proved by him in answer to the question excluded.—Capital Nat. Bank v. Wilkerson, Ind., 72 N. E. Rep. 247.

10. ATTACHMENT—Conversion.—One having possession of personal porperty, claiming a lien thereon, may sue for conversion one who wrongfully attached the property.—Fred Krug Brewing Co. v. Healey, Neb., 101 N. W. Rep. 329.

11. BANKRUPTCY—Discharge.—Under the bankruptcy act the burden is on one who attacks a title, good except for a discharge in bankruptcy, to show that the discharge affected the claim upon which such title is based.—Imhoff v. Whittle, Tex., 82 S. W. Rep. 1056.

12. BANKRUPTCY—Failure to Allege Bankruptcy.—Failure of plaintiff to allege his bankruptcy held not a fraud, or ground for a new trial, but a matter of defense, to have been set up by defendant.—Coulson v. Ferree, Ky., 82 S. W. Rep. 1000.

13. BANKRUPTCY—Fraudulent Transfer.—Judgment entered four months before bankruptcy of debtor held a lien on real estate of debtor, and also on that fraudulently transferred.—Hillyer v. Le Roy, N. Y., 72 N. E. Rep. 237.

14. BANKRUPTCY — Habeas Corpus. — Bankr. Act July 1, 1898, § 9a, entitles a bankrupt to be discharged by a writ of *habeas corpus* from detention under — civil procees for a debt or claim from which his discharge would be a release, although he was taken into custody before the bankruptcy.—People v. Erlanger, U. S. D. C., S. D. N. Y., 132 Fed. Rep. 883.

15. BANKRUPTCY—Recovery of Unlawful Preference.—On recovery of an unlawful preference by a trustee in bankruptcy, plaintiff is entitled to interest from the date of demand for the return of the preference.—Capital Nat. Bank v. Wilkerson, Ind., 72 N. E. Rep. 247.

16. BANKRUPTCY—Rights of Creditors.—Under Code § 2906, a creditor of a chattel mortgagor at the time a mortgage is executed held entitled to attack a mortgage only after obtaining the lien, though a subsequent creditor may do so without obtaining a lien.—Murphy v. W. T. Murphy & Co., Iowa, 101 N. W. Rep. 486.

17. BANKRUPTCY—Suit by Trustee.—In a suit by a trustee in bankruptcy to subject property in name of defendants to claims against the bankrupt, allegations of petition and evidence held not to entitle him to a decree.—Roney v. Conable, Iowa, 101 N. W. Rep. 505.

18. BANKRUPTCY — Wills, Rights of Legatee. — Will construed, and held, that a legacy to a [illegible] passed to his trustee in bankruptcy, appointed in proceedings pending prior to the payment of such legacy.—Watkins v. Bigelow, Minn., 101 N. W. Rep. 497.

19. BANKS AND BANKING — Check, Appropriation of Fund.—A check drawn against a draft attached to a bill of lading held an appropriation of so much of the proceeds of the draft as was necessary to pay the check.—Parkersburg Mill Co. v Farmers' & Traders' Nat. Bank, Ky., 82 S. W. Rep. 1003.

20. BENEFIT SOCIETIES—Change of Beneficiaries.—A member of a mutual benefit insurance society held entitled to change the beneficiary, unless he has obtained a vested interest in the insurance.—Preusser v. Supreme Hive of Ladies of Maccabees of the World, Wis., 101 N. W. Rep. 358.

21. BILLS AND NOTES — Bona Fide Purchaser.—An indorsement of a note held a commercial indorsement, so that the transferee did not take it subject to all equities.—Thorpe v. Mindeman, Wis., 101 N. W. Rep. 417.

27. CANCELLATION OF INSTRUMENT—Deeds, Breach of Contract.—Failure of purchaser of land to carry out a contract to erect a building thereon held not to entitle the vendor to rescind the sale, but merely to recover damages.—Troxler v. New Era Bldg. Co., N. Car., 49 S. E. Rep. 58.

28. CARRIERS—Defective Windows, Question for Jury—In an action for injuries to a passenger, it was not error for the court to refuse special charges instructing the jury to eliminate certain allegations in plaintiff's petition, on which there was no evidence, from their consideration.—Missouri, K. & T. Ry. Co. of Texas v. Gannady, Tex., 82 S. W. Rep. 1069.

29. CARRIERS—Insult Given by Other Passengers.—A negro passenger held not precluded from recovering damages sustained by the acts of certain intoxicated white passengers, on the ground that his damage consisted of mental anguish and humiliation, unaccompanied by physical or bodily injury.—International & G. N. R. Co. v. Henderson, Tex., 82 S. W. Rep. 1065.

30. CARRIERS — Loss of Goods, Connecting Carrier.—A loss of goods during transportation presumptively oc

curred on a connecting carrier's line.—Bullock v. Boston & H. Dispatch Co., Mass., 72 N. E. Rep. 256.

31. CARRIERS—Perishable Freight. — Where cabbages were injured by the carrier's negligence, it was responsible, though some of the injuries resulted after the shipment had passed from its possession.—Houston & T. C. R. Co. v. Wilkerson Bros., Tex., 82 S. W. Rep. 1069.

32. CARRIERS—Traffic Pool.—It is no justification of a traffic pool, created by agreement between railroad companies in violation of the interstate commerce act, that it was designed to and does prevent unlawful rebates from other lines to shippers.—Interstate Commerce Commission v. Southern Pac. Co., U. S. C. C., S. D. Cal 132 Fed. Rep. 829.

33. CHATTEL MORTGAGES—Sale of More than Enough to Satisfy. — Where a chattel mortgagee, after notice, sells more than sufficient property to satisfy the same and the costs, he will be liable for conversion of excess. —Skow v. Locke, Neb., 101 N. W. Rep. 340.

34. COMMERCE—Regulation of Business.—Acts 1903, p. 110, for the regulation of a certain class of business, is not a regulation of interstate commerce, within Const. U. S. art. 8, § 1.—State v. Preferred Tontine Mercantile Co., Mo., 82 S. W. Rep. 1075.

35. CONSTITUTIONAL LAW — Criminal Law, Ex Post Facto.—Where defendant was convicted of a felony before the passage of Laws 1903, p. 571, ch. 375, held that it was, as to him, *ex post facto*.—State v. Tyree, Kan., 78 Pac. Rep. 525.

36. CONSTITUTIONAL LAW — Jurisdiction of Interstate Commerce Commission.—An order of the interstate commerce commission requiring railroads to desist from enforcing a rule and practice is not legislative in character, because the rule is embodied in a joint through tariff published by the carriers, where it is also promulgated to the public and enforced against all shippers.—Interstate Commerce Commission v. Southern Pac. Co., U. S. C. C., S. D. Cal., 132 Fed. Rep. 829.

37. CONSTITUTIONAL LAW—License Tax, Police Power. —The possession or disposition of property dangerous to the health and safety of the community, such as inflammable oils, may be regulated by the state in the exercise of the police power.—Standard Oil Co. v. Commonwealth, Ky., 82 S. W. Rep. 1020.

38. CONSTITUTIONAL LAW—Regulation of Business.—Acts 1903, p. 110, is not retroactive in its operation, as it gives persons affected thereby an opportunity to comply with its provisions before its penalties attach.—State v. Preferred Tontine Mercantile Co., Mo., 82 S. W. Rep. 75.

39. CONSTITUTIONAL LAW—Sanitary Regulations, Police Power.—Laws 1901, p. 912, ch. 334, § 100, as amended by Laws 1902, p. 937, ch. 352, § 4, relating to school sinks, held not to violate the fourteenth amendment of the United States constitution.—Tenement House Department of City of New York v. Moeschen, N. Y., 72 N. E. Rep. 231.

40. CONSTITUTIONAL LAW—Taxes, for Building Fences. —Act Dec. 23, 1882, Act Dec. 24, 1883, and Act Dec. 26, 1884, held not a violation of Const. art. 10, § 6, as authorizing towns not under the stock law to collect taxes for building fences.—McCullough v. Graham, S. Car., 49 S. E. Rep. 1.

41. CONTRACTS—Interpretation of Technical Words.—Technical words are to be interpreted as understood by persons in the profession or business to which they relate. — Peterson v. Modern Brotherhood of America, Iowa, 101 N. W. Rep. 289.

42. CONTRACTS—Interpretation, Question for Jury.—The interpretation of a contract, where the language was ambiguous and its meaning depended upon the sense in which it was used, held a mixed question of law and act for determination by the jury.—Norton v. Shields, v. S. C. C., S. D. N. Y., 132 Fed. Rep. 873.

43. CONTRACTS—Mutuality.—A contract to purchase a piano and to pay a part of the price in advertising, which was assigned to defendant, held not void for want of mutuality between plaintiff and the assignee.—Mail & Times Pub. Co. v. Marks, Iowa, 101 N. W. Rep. 458.

44. CONTRACTS—Vendor and Purchaser.—A contract may be discharged by the parties thereto, or the beneficiaries therein, by new contract with reference to the same subject-matter.—Marsh v. Despard, W. Va., 49 S. E. Rep. 24.

45. CORPORATIONS—Action by Stockholders, Fraudulent Foreclosure.—Stockholders of a corporation held entitled to bring action in their names to set aside a decree foreclosing mortgage on the corporation's property, its officers having refused to bring the action.—Whitney v. Hazzard S. Dak., 101 N. W. Rep. 346.

46. CORPORATIONS—Authority for Stock Dividend.—Where a corporation without authority declares a stock dividend, an implied promise on the part of stockholders receiving such additional stock to pay therefor arises only in favor of subsequent creditors.—Anglo-American Land, Mortgage & Agency Co. v. Lombard, U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 721.

47. CORPORATIONS—Creditors' Suit, Bill Quia Timet.—Claims against a corporation, based on unliquidated damages for torts alleged to have been committed by it, cannot, standing alone, form any basis for a creditor's bill against the corporation.—Slover v. Coal Creek Coal Co., Tenn., 82 S. W. Rep. 1131.

48. CORPORATIONS—Officers, Contracts with Themselves Individually.—The by-laws of a corporation held not to authorize the president thereof to contract with himself.—Smith v. Pacific Vinegar & Pickle Works, Cal., 78 Pac. Rep. 550.

49. CORPORATIONS—Trade-Name.—A corporation will be enjoined from using a trade-name lawfully adopted prior thereto by a partnership engaged in a like business at the same place.—Nesne v. Sundet, Minn., 101 N. W. Rep. 490.

50. COSTS—Settling Bill of Exceptions.—The expense of settling a bill of exceptions in the district court is taxable as costs in that court, to be adjudged against the unsuccessful party in the final determination of the litigation.—Pettis v. Green River Asphalt Co., Neb., 101 N. W. Rep. 333.

51. CRIMINAL TRIAL—Dying Declarations.—An objection to deceased's dying declarations held not reviewable, where defendant failed to bring up all the testimony showing the foundation on which they were admitted.—Kimberlain v. State, Tex., 82 S. W. Rep. 1043.

52. CRIMINAL TRIAL — Homicide, Character of Deceased.—In *habeas corpus* by one charged with homicide, relator held entitled to prove by deceased's widow that deceased was a man of ungovernable temper.—*Ex parte* McCoy, Tex., 82 S. W. Rep. 1044.

53. CRIMINAL TRIAL—Jurisdiction, Assault and Battery.—Assault and battery is an offense at common law, and cognizable by courts which exercise jurisdiction in such cases.—State v. McKain, W. Va., 49 S. E. Rep. 20.

54. CRIMINAL TRIAL—Peremptory Challenges. — The swearing of the jury in a criminal prosecution before defendant had exhausted his peremptory challenges is not reversible error, where defendant did not object or except to the swearing of the jury.—State v. Icenbice, Iowa, 101 N. W. Rep. 273.

55. CRIMINAL TRIAL—Presence of Parties.—Where the record shows that defendants were present at the opening of the court, but that the jury were given a 10 minutes' recess, it is not necessary that the record should show defendants were present on the resumption of the trial.—Flohr v. Territory, Okla., 78 Pac. Rep. 565.

56. CUSTOMS AND USAGES—Fire Policy Conditions.—A custom which contradicts a contract whose terms are plain is bad, though a custom is admissible to explain doubtful terms.—Boruszewski v. Middlesex Mut. Assur. Co., Mass., 72 N. E. Rep. 250.

57. CUSTOMS AND USAGES—Live Wires.—A witness held not entitled to testify as to a custom as to the re-

moval of electric wires in the way of a house being moved, in the absence of evidence showing his knowledge of such custom.—Nagle v. Hake, Wis., 101 N. W. Rep. 409.

58. DEEDS—Condition Subsequent.—Mere nonuser for 2 1-2 years of a lot conveyed "for use of a school, and no other use," held not to work a forfeiture.—Buck v. City of Macon, Miss., 37 So. Rep. 460.

59. DEPOSITARIES—Duty of County Treasurer.—Under Cobbey's Ann. St. 1903, § 10,870, county treasurer must keep on deposit in each of the depository banks of the county its proportionate share of the public money.—State v. Cronin, Neb., 101 N. W. Rep. 325.

60. DESCENT AND DISTRIBUTION—Advancements.—A debt from an heir to an ancestor may be converted by the ancestor, with the consent of the heir, into an advancement.—Lodge v. Fitch, Neb., 101 N. W. Rep. 338.

61. DIVORCE—Community Property.—Under the statute regulating divorces, the court has jurisdiction to inquire into the community property of the plaintiff and defendant, and to make disposition of the same between them. —*Ex parte* Latham, Tex., 82 S. W. Rep. 1046.

62. DIVORCE—Custody and Support of Children.—A divorced husband's offer to take the children awarded to his divorced wife and support them held no defense to the wife's application to compel him to aid in their support.—Ostheimer v. Ostheimer, Iowa, 101 N. W. Rep. 275.

63. DIVORCE—Where Both Parties at Fault.—Where neither party to an action for divorce on the ground of conjugal infidelity was innocent of wrongdoing, a divorce would be denied to both.—Wells v. Wells, Mo., 82 S. W. Rep. 1103.

64. DOWER—Contracts for Support.—A contract between a father and son, whereby the latter was to remain at home and take care of the farm, held not to affect the rights of the father's wife to have the homestead set off to her as a part of her dower.—Eastwood v. Crane, Iowa, 101 N. W. Rep. 481.

65. EJECTMENT—Appeal, Waiver of Objection to Instructions.—Careful search of record to determine whether instructions complained of were in all respects strictly accurate, held waived in argument on appeal. —Illinois Steel Co. v. Jeka, Wis., 101 N. W. Rep. 899.

66. ELECTIONS—Rival Conventions.—Where the state central committee of a political party has determined a contest after notice, and its action has been affirmed by the state convention, such determination is conclusive on the courts between rival nominees of such conventions for county officers.—State v. Larson, N. Dak., 101 N. W. Rep. 315.

67. ELECTRICITY—Live Wires, Instruction as to Care Required.—In an action for injuries from a live electric wire, an instruction held not objectionable as requiring the use of more than ordinary care.—Nagle v. Hake, Wis., 101 N. W. Rep. 409.

68. EMBEZZLEMENT—Conversion of Property Received as Bailee.—Where a person receives property as bailee or with the consent of the owner, intending to comply with the owner's wishes, and afterwards converts the property, the crime is embezzlement.—Flohr v. Territory, Okla., 78 Pac. Rep. 565.

69. EMINENT DOMAIN-Health Regulations-Under Rev. St. 1899, § 5961, a city held liable for seizing private property, without compensation and without the consent of its owner for a temporary pesthouse.—Barton v. City of Odessa, Mo., 82 S. W. Rep. 1119.

70. EQUITY—Cutting Timber from School Lands.—Bill for damages for cutting and removing timber from school lands held too indefinite to call an answer, and a demurrer was properly sustained thereto.—Adams v. Griffin, Miss., 37 So. Rep. 457.

71. ESTOPPEL—Conveyance of Property.—A conveyance of property estops grantor, a party to an action to quiet title, from setting up any title in himself, but does not estop his wife, who did not unite in the conveyance. —Cunningham v. Cunningham, Iowa, 101 N. W. Rep. 470.

72. EVIDENCE—Medical Testimony as to Cause of Death.—Experts, who had either treated insured professionally or took part in the post mortem examination, held entitled to testify to the cause of death.—Morrow v. National Masonic Acc. Ass'n, Iowa, 101 N. W. Rep. 468.

73. EVIDENCE—Parol Evidence, Contents of Inventory. —Where an inventory of insured goods was destroyed with the goods, parol evidence of its contents is admissible.—S. E. Hanna & Co. v. Orient Ins. Co., Mo., 82 S. W. Rep. 1822.

74. EVIDENCE—Payment of Premium.—In an action on a life policy, where the issue was whether a certain premium had been paid, statements of the insured, after the time for payment, to the effect that he intended to keep up his insurance, were inadmissible.—Brown v. Pacific Mut. Life Ins. Co. of California, Mo., 82 S. W. Rep. 1122.

75. EXECUTORS AND ADMINISTRATORS—Compensation for Services to Relatives.—A nephew held not entitled to recover for services rendered his uncle, in the absence of any showing that both parties intended that compensation should be paid.—Green's Ex'r v. Green, Ky., 82 S. W. Rep. 1011.

76. FALSE IMPRISONMENT—Punitive Damages Against Police Officers.—In an action on a police officer's bond for damages for unlawful arrest, punitive damages held not recoverable.—Easton v. Commonwealth, Ky., 82 S. W. Rep. 996.

77. FEDERAL COURTS—Conclusive Effect of State Decisions.—A settled rule of decision in a state court establishes the law of the state, so as to bind the federal courts in all matters controlled by the state law.—Anglo-American Land, Mortgage & Agency Co. v. Lombard, U. S. C. C. of App., Eighth Circuit, 132 Fed. Rep. 721.

78. FIRE INSURANCE—Bailee's Failure to Collect Insurance.—A bailee who had effected insurance on the bailed property, but who after its destruction neglected to collect the insurance, held liable to the bailor for damages resulting from its default. Rev. St. 1898, § 2607.—Johnston v. Charles Abresch Co., Wis., 101 N. W. Rep. 895.

79. FIRE INSURANCE—Concurrent Insurance.—An insurance policy for $2,500 construed, and held to permit other concurrent insurance not to exceed $2,500.—L'Engle v. Scottish Union & National Fire Ins. Co., Fla., 37 So. Rep. 462.

80. FIRE INSURANCE—Conditions Precedent.—The performance by an assured of the conditions specified in a fire policy held a condition precedent to the liability of the insurer in case of loss.—Baruszewski v. Middlesex Mut. Assur. Co., Mass., 72 N. E. Rep. 250.

81. FIRE INSURANCE—Retaining Premium, Waiver.—Where the insurance company retains unearned premiums after notice that the policy was void under its terms, it is some proof of waiver.—Pearlstine v. Westchester Fire Ins. Co., S. Car., 49 S. E. Rep. 4.

82. FIXTURES—Oil Lease.—An oil and gas lease construed, and held, that the machinery and fixtures were not parts of the freehold, and the lessees or the owners of the fixtures had a reasonable time after the termination of the lease to remove said property.—Gartlan v. Hickman, W. Va., 49 S. E. Rep. 14.

83. FRAUD—False Representations.—A refusal by a vendor to warrant or guaranty the quantity or quality of the property sold is not inconsistent with liability for false representations in such respect.—Boddy v. Henry, Iowa, 101 N. W. Rep. 447.

84. FRAUDS, STATUTE OF—Memorandum, Description of Property.—A memorandum of a contract of sale is not void under the statute of frauds for uncertainty in description, if the land can be identified from the description with the aid of parol evidence.—Ruzicka v Hotovy, Neb., 101 N. W. Rep. 328.

85. FRAUDULENT CONVEYANCES — Rights of Creditors. —Judgment creditors held entitled to enforce judgment by sale of land fraudulently transferred or to sue in equity to set aside the transfer.—Hillyer v. LeRoy, N. Y., 72 N. E. Rep. 287.

86. GARNISHMENT — Payment After Garnishment. — After the service of a garnishment, the garnishee could not pay debt, as against plaintiff, by the conveyance of land to his creditor.—Maggard v. Asher, Ky., 82 S. W. Rep. 1062.

87. GUARANTY—Collateral Security.—Pledgee of stock as collateral held not entitled to base claim against surety on note for which the collateral was given, on promise of guaranty by the surety.—Iowa Nat. Bank v. Cooper, Iowa, 101 N. W. Rep. 459.

88. HEALTH — Police Power. — Tenement House Act Laws 1901, p. 912, ch. 334, § 100, as amended by Laws 1902, p. 937, ch. 352, § 47, relating to school sinks in tenement houses, held a proper exercise of the police power.—Tenement House Department of City of New York v. Moeschen, N. Y., 72 N. E. Rep. 231.

89. HOMESTEAD — Widow's Quarantine. — Notwithstanding a widow's right of quarantine and dower, the minor children have an interest in the homestead of which she cannot deprive them, and they are entitled to the rents and profits up to their majority.—Gorman v. Hale, Mo., 82 S. W. Rep. 1110.

90. HOMICIDE — Proof Required, Indictment Setting Out Means Employed. — Where, in a prosecution for homicide, the indictment alleges the means by which it was committed, the state is limited to proof of such means.—Becknell v. State, Tex., 82 S. W. Rep 1039.

91. HUSBAND AND WIFE—Conveyance of Real Estate by Wife.—A married woman can be bound only by her deed, duly executed with the written assent of her husband and with her privy examination, or by the judgment of a court of competent jurisdiction.—Smith v. Bruton, N. Car., 49 S. E. Rep. 64.

92. HUSBAND AND WIFE—Fraudulent Conveyances.—Signing of a note by a married woman as principal, when the note in fact evidenced the debt of another, held a mere evasion of the statute prohibiting married women from becoming sureties, and ineffectual to bind her.—H. O. Hines & Co. v. Hays, Ky., 82 S. W. Rep. 1007.

93. INTOXICATING LIQUORS—Mulct Law, Warehouses.—The keeping of a warehouse for the storage of beer in car load lots by a saloon keeper held in violation of Code, § 2448, subd. 4.—Bell v. Hamm, Iowa, 101 N. W. Rep. 475.

94. JUDGMENT—Collateral Security. — That judgment *in personam* in a decree had become barred held not to render dormant that part of the decree declaring that the creditor held a valid legal title to collateral securing debt.—Conway v. Caswell, Ga., 48 S. E. Rep. 956.

95. JUDGMENT—Replevin, Res Judicata.—Judgment in replevin to recover possession of chattel security held *res judicata* in any further attempt to enforce the notes.—Nichols & Shepard Co. v. Trower, Okla., 78 Pac. Rep. 575.

96. JURY — Examination, Discretion of Court. — The trial court has a discretion in ascertaining the fitness of persons for jury service, and counsel must conduct their examination within reasonable limits and by pertinent questions.—South Covington & C. St. Ry. Co. v. Weber, Ky., 82 S. W. Rep. 986.

97. LARCENY — Indictment, Setting Out Act Relied Upon.—Where, in an indictment for larceny, the property is charged to have been taken by fraud and stealth, it is not necessary to set out the fraudulent acts relied upon.—Flohr v. Territory, Okla., 78 Pac. Rep. 563.

98. LICENSES - Franchise Taxes.—Prohibitory license taxes are permissible only in case of pursuits or indulgences which in their general effect are believed to be more harmful than beneficial to society, and which the public interest requires to have ended — Standard Oil Co. v. Commonwealth, Ky., 82 S. W. Rep. 1020.

99. LIFE ESTATES—Notice, Rights of Purchasers from Life Tenant.—A purchaser from a life tenant with notice of his grantor's title held chargeable with the income of the estate during his possession, less taxes and expenses for improvements.—Keller v. Fenske, Wis., 101 N. W. Rep. 378.

100. MALICIOUS PROSECUTION — Probable Cause. — A declaration for the malicious issuance and execution of a search warrant without probable cause held not defective for failure to allege plaintiff's acquittal of the crime charged.—Spangler v. Booze, Va., 49 S. E. Rep. 42.

101. MANDAMUS—Affidavit on Information and Belief. —A writ of mandate does not lie to require a trial judge to include in a bill of exceptions to review an order on a motion for a new trial an affidavit made on information and belief.—Gay v. Torrance, Cal., 78 Pac. Rep. 540.

102. MANDAMUS — Election Commissioners, Name on Ballot.—Petition for mandamus to compel election commissioners to print relator's name on ballots as party nominee held defective in failing to show that the delegates who nominated relator were duly elected and accredited.—State v. McCaffrey, Mo., 82 S. W. Rep. 1104.

103. MASTER AND SERVANT—Assumed Risk, Stepping Over Pit.—An employee who attempts to cross a pit in a room, instead of going round it, by stepping on a brace plainly intended as such, held to assume the risk.—Gillette v. General Electric Co., Mass., 72 N. E. Rep. 255.

104. MASTER AND SERVANT—Defective Appliances.—A servant, though bound to use ordinary care to avoid injury from the use of a defective appliance, is not bound to make a critical examination thereof.—Ahrens & Ott Mfg. Co. v. Rellihan, Ky., 82 S. W. Rep. 993.

105. MASTER AND SERVANT—Fellow Servant. Injury to Railroad Fireman.—Where an injury to a railroad fireman resulted from the concurring negligence of his conductor and a brakeman, the railroad was liable as though it was alone blamable.—Virginia & S. W. Ry. Co. v Bailey, Va., 49 S. E. Rep. 33.

106. MASTER AND SERVANT—Injuries to Employee of Subcontractor.—An employee of a subcontractor held, as against the contractor, not to assume the risk from negligence of the latter's employee.—Dale v. Hill-O'Meara Construction Co., Mo., 82 S. W. Rep. 1092.

107. MASTER AND SERVANT—Injuries to Servant, Latent Defects.—The refusal of an instruction, in an action by a railroad employee to recover for an injury caused by the coming loose of a handhold, with respect to the nonliability of the company for latent defects, held error.—Illinois Cent. R. Co. v. Coughlin, U. S. C. C. of App., Sixth Circuit, 132 Fed. Rep. 801.

108. MASTER AND SERVANT—Injuries to Servants, Submission of Issues.—In an action for injuries to a track hand, who was struck by a train, it was improper for the court to submit to the jury plaintiff's duty to use reasonable care to discover and avoid trains as an issue in the case.—International & G. N. R. Co. v. Villareal, Tex., 82 S. W. Rep. 1063.

109. MONEY RECEIVED—Creditor, Money in Excess of Amount Due.—A creditor of a firm having received, under a trust agreement, from the firm assets, money in excess of the amount due from one of the partners, the latter was entitled to recover the overplus, in assumpsit as money had and received to his use.—Langhorne v. McGhee, Va., 49 S. E. Rep. 44.

110. MORTGAGES—Judgment Creditors of Mortgagor. —A judgment creditor, as against the mortgagee, is entitled to all the surplus proceeds of the sale of the mortgaged land after the payment of the mortgage debt.—Staton v. Webb, N. Car., 49 S. E. Rep. 55.

111. MUNICIPAL CORPORATIONS — Contracts, Ratification.—Where a village was enjoined from complying with the terms of a contract, because not legally authorized, such fact is no defense to an action to recover thereon, after it had been legally renewed.—Swenson v. Village of Bird Island, Minn., 101 N. W. Rep. 495.

112. MUNICIPAL CORPORATIONS—Damages, Failure to Construct Sufficient Culverts.—In an action against a

city for damages to a brickyard by reason of being flooded in consequence of the city's failure to construct sufficient culverts across a stream, the expense in restoring the yard held recoverable.—Davelaar v. City of Milwaukee, Wis., 101 N. W. Rep. 361.

113. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action for injuries resulting from a defective sidewalk, whether or not the city had established a sidewalk where the accident occurred was a question of fact.—Cannady v. City of Durham, N. Car., 49 S. E. Rep. 50.

114. MUNICIPAL CORPORATIONS — Defective Streets, Evidence of Changes After Accident.—Defendant, in an action for injury from a defective street, having introduced a photograph thereof, held, that plaintiff, in rebuttal, may show it was changed after the accident and before the photograph was taken.—Achey v. City of Marion, Iowa, 101 N. W. Rep. 435.

115. MUNICIPAL CORPORATIONS—Funding Bonds, Recitals.—A recital in municipal bonds that they were issued to fund valid outstanding warrants is a sufficient recital of the purposes for which they were issued.—City of Tyler v. Tyler Building & Loan Assn., Tex., 82 S. W. Rep. 1066.

116. MUNICIPAL CORPORATIONS—Leasing City Park for Racing.—Citizens and taxpayers, stating no special harm, cannot enjoin the lease of a part of a city park for the purpose of racing horses.—Bryant v. Logan, W. Va., 49 S. E. Rep. 21.

117. MUNICIPAL CORPORATIONS—Street Improvements' Legislative Authority.—The right of a city to establish sidewalk grades, etc., held legislative, and, when exercised within the prescribed limits, cannot be controlled by the courts.—Kemp v. City of Des Moines, Iowa, 101 N. W. Rep. 474.

118. NEW TRIAL—Motion for, Sufficiency of Amdavits.—An affidavit on a motion for a new trial for irregularities in the proceedings of the court cannot be considered, when made merely on information and belief.—Gay v. Torrance, Cal., 78 Pac. Rep. 540.

119. PARTITION—Necessary Parties.—In a suit for partition, held error to render a final decree, ignoring the interest of certain parties, without giving them an opportunity to assert their rights.—Cotton v. Cash, Miss., 37 So. Rep. 459.

120. PARTNERSHIP — Indebtedness. — A creditor of a firm held bound by a compromise between the partners, in so far as it affected the individual liability of one of the members of the firm thereon.—Langhorne v. McGee, Va., 49 S. E. Rep. 44.

121. PHYSICIANS AND SURGEONS—State Regulation.—The practice of medicine is a mere privilege, on the exercise of which the state may impose such conditions as it deems advisable.—State v. Edmunds, Iowa, 101 N. W. Rep. 431.

122. PLEADINGS—Inconsistent Defenses.— Defendant may set forth in his answer various grounds of defense, if they are so repugnant that, if one is true, the other is false.—Western Travelers' Acc. Ass'n v. Tonnson, Neb., 101 N. W. Rep. 341.

123. PLEADING—Sufficiency of Complaint.—The prayer in a complaint held to warrant the granting of any relief to which plaintiff is entitled on the allegations and proof.—Merk v. Bowery Min. Co., Mont., 78 Pac. Rep. 519.

124. PLEADING — Superfluous or Repugnant Allegations.—Where an answer pleads a good defense, superfluous or repugnant allegations are to be eliminated by a motion for that purpose.—Ryan v. Riddle, Mo., 82 S. W. Rep. 1117.

125. PLEDGES—Consent of Pledgor to Subpledge.—The consent of the pledgor is not essential to the right of the pledgee to make an assignment or subpledge of the property.—Coleman v. Anderson, Tex., 81 S. W. Rep. 1057.

126. PLEDGES—Sale of Collateral Security, Application of Proceeds.—Pledgee of stock as collateral security held not entitled to use proceeds of sale thereof, otherwise than to apply on note for which it stood as security.—Iowa Nat. Bank v. Cooper, Iowa, 101 N. W. Rep. 459.

127. PRINCIPAL AND AGENT—Authority to Purchase on Credit.—If an agent is authorized to make a purchase, and no funds are advanced to him, he is by implication authorized to purchase on the credit of his principal.—Brittain v. Westall, N. Car., 49 S. E. Rep. 54.

128. PRINCIPAL AND AGENT—Power of Attorney to Compromise Suit.—A stipulation made by an attorney in fact, authorized by a complainant to conduct or compromise a suit, for the submission of the matters in controversy to a special tribunal, held not binding on the principal, and not to render him liable for the expense of such submission.—City of New York and City of Brooklyn v. DuBois, U. S. C. C. of App., Third Circuit 132 Fed. Rep. 752.

129. PRINCIPAL AND SURETY—Bond of Secretary, Construction.—Where the secretary of a corporation gave a bond, his sureties assumed their obligation thereunder with reference to the articles and by-laws.—Danvers Farmers' Elevator Co. v. Johnson, Minn., 101 N. W. Rep. 492.

130. PRINCIPAL AND SURETY— Effect of Extending Time of Payment.—Where a surety agreed to be regarded as a principal, as between himself and the creditor, extensions of time of payment would not release him from liability.—Merchants' Nat. Bank v. Murphy, Iowa, 101 N. W. Rep. 441.

131. PROHIBITION— Execution of Decree.— Where a personal decree for money is made on publication against nonresidents, they must first apply to the circuit court to vacate the decree before asking for a writ of prohibition.—Jennings v. Bennett, W. Va., 49 S. E. Rep. 28.

132. RAILROADS — Negligence, Excessive Speed.—The running of a train at a rate of 60 miles an hour in the suburbs of a city is not of itself negligence, but is to be considered on the question of negligence.—Golinvaux v. Burlington, C. R. & N. R. Co., Iowa, 101 N. W. Rep. 465.

133. RELEASE—Scope, When Extended to One or Two Defendants.—A release by a father, executed to one or two defendants in a suit by the father's minor son, of the damages sustained by the father, held not a discharge of the other defendant's liability to the son.—Nagle v. Hake, Wis., 101 N. W. Rep. 409.

134. RELIGIOUS SOCIETIES — Incorporated Church, Power of Trustees.—An incorporated Roman Catholic Church held to have power to give part of its general funds to a Catholic parish.—Enos v. Harkins, Mass., 72 N. E. Rep. 253.

135. REPLEVIN—Evidence of Mortgagor's Title.—It is error, in an action of claim and delivery, to admit in evidence a judgment record against plaintiff, who was not a party to the judgment, and which did not form a link in defendant's chain of title.—Chapman v. Greene, S. Dak., 101 N. W. Rep. 351.

136. SALES—Warranty, Description.—Where goods are sold by exact description, there is an implied warranty that the goods are of the description contracted for.—Beck & Corbet Iron Co. v. Holbeck, Mo., 82 S. W. Rep. 1128.

137. SCHOOLS AND SCHOOL DISTRICTS — Regulations, Visiting Saloons.—A requirement by the proprietor of a business school that teachers shall not frequent saloons in the vicinity is, as a matter of law, a reasonable regulation.—Koons v. Langum, Minn., 101 N. W. Rep. 490.

138. SHIPS AND SHIPPING — Unseaworthiness from Overloading.—A barge which sank at a dock after loading a cargo of bricks held liable for the damage to the cargo on the ground of unseaworthiness, due to overloading.—The G. B. Boren, U. S. D. C., S. D. N. Y., 132 Fed. Rep. 887.

139. SPECIFIC PERFORMANCE — Contract to Bequeath Property. — Specific enforcement of a contract to bequeath personalty in return for personal services held not inequitable or unjust.—Earnhardt v. Clement, N. Car., 49 S. E. Rep. 49.

140. STATUTES — Change in Phraseology. — A mere change in phraseology in the revision of a statute will not work a change of a law previously declared unless it clearly appears that such was the intention of the legislature.—Eastwood v. Crane, Iowa, 101 N. W. Rep. 481.

141. STREET RAILROADS — Collision with Team.—One struck by a street car while driving along its track held not guilty of such negligence as to bar him as matter of law from recovery.—Kimble v. St. Louis & S. Ry. Co., Mo., 82 S. W. Rep. 1096.

142. STREET RAILROADS—Collision with Wagon, Right of Way.—No right of way exists in favor of one crossing the tracks of a street railway, when a diminution of the speed of the car is necessary to enable him to pass in safety.—Goldmann v. Milwaukee Electric Ry. & Light Co., Wis., 101 N. W. Rep. 384.

143. STREET RAILROADS—Degree of Care Required.—Until the passenger has finally left the carrier's vehicle at his destination, the carrier is required to exercise the utmost care and diligence, and is liable for the slightest neglect.—McKinstry v. St. Louis Transit Co., Mo., 82 S. W. Rep. 1108.

144. STREET RAILROADS—Negligence, Live Wires.—In an action for injuries from a live electric wire, a requested instruction, merely stating the converse of a proposition charged in an instruction on proximate cause, held properly refused.—Nagle v. Hake, Wis., 101 N. W. Rep. 409.

145. TAXATION—Recall of Check.—Defendant held not liable for amount of check given in payment of taxes, and protest fees, he having stopped payment on check because of unauthorized inclusion of certain matters, in the account for which the check was given.—Dolman v. Pitt, Mo., 82 S. W. Rep. 1111.

146. TAXATION—Tax Collector's Deed.—Refusal to admit in evidence and consider a tax collector's deed, made an exhibit to the bill, on which complainants base their title, held error, under Rev. Code 1892, §§ 1806, 3817. —Wallace v. Lyle, Miss., 37 So. Rep. 460.

147. TRESPASS — Requisites of Petition. — In trespass *quare clausum fregit*, the petition should describe the land, allege title in plaintiff, and designate the injury sued for, but need not recite plaintiff's chain of title.—Gray v. Peay, Ky., 82 S. W. Rep. 1006.

148. TRIAL—Contract to Bequeath Property, Instructions.—Instructions that on a certain state of facts "plaintiff cannot recover" are properly refused, under the system of procedure by which the jury responds to specific issues.—Earnhardt v. Clement, N. Car., 49 S. E. Rep. 49.

149. TRIAL—Expert Testimony, Weight of Evidence.—In an action on an accident policy, an instruction as to the weight to be given expert testimony as to the cause of insured's death held not objectionable as belittling such evidence. — Morrow v. National Masonic Acc. Assn., Iowa, 101 N. W. Rep. 468.

150. TRIAL—Fire Insurance, Instructions.—The court cannot in its charge, on request, select isolated facts shown in the evidence, and state their effect.—Pearlstine v. Westchester Fire Ins. Co., S. Car., 49 S. E. Rep. 4.

151. TRUSTS—Acquiring Estate with Knowledge.—One acquiring a trust estate, with knowledge of its character and while occupying confidential relations, will be presumed to have taken title subject to the trust.—Schwingel v. Anthos, Neb., 101 N. W. Rep. 835.

152. TRUSTS — Establishment, Character of Evidence Required.—One seeking to avoid the legal title to property, or to charge the holder with a trust, must affirmatively establish his claim by clear evidence.—Cunningham v. Cunningham, Iowa, 101 N. W. Rep. 470.

153. USURY—Interest, Validity of Contract.—In a suit by mortgagor's assignee to restrain a mortgage sale, held, that the injunction should have been continued to final hearing to obtain a construction of an agreement whereby the assignor agreed to pay the amount "actually due" on the mortgage.—Erwin v. Morris, N. Car., 49 S. E. Rep. 53.

154. VENDOR AND PURCHASER—Description of Land.—A contract for sale of land known as the "Phil Allen Place" held not to contain a patent ambiguity, and not be void for uncertainty, where it can by extrinsic evidence be shown what land such place embraced.—Raines v. Baird, Miss, 37 So. Rep. 458.

155. VENDOR AND PURCHASER — Option, Acceptance and Alteration —Where an option for the purchase of land is accepted, a request for a modification as to the time of the performance of the contract held not an element in the making thereof.—Turner v. McCormick, W. Va., 49 S. E. Rep. 28.

156. VENDOR AND PURCHASER—Rescission of Contract. —An executory contract for the sale of land can be rescinded or waived by writing or by parol, if possession be given up or the writing destroyed.—Marsh v. Despard, W. Va., 49 S. E. Rep. 24.

157. WILLS—Contest, Burden of Proof.—In a will contest, the burden held to be on plaintiffs to establish allegations of their petition by a preponderance of the evidence, so far as the same related to the signing of the instrument.—Beebe v. McFaul, Iowa, 101 N. W. Rep. 267.

158. WILLS — Contract to Bequeath Property.—A bequest of property in trust is not a substantial compliance with a contract to bequeath it absolutely. —Earnhardt v. Clement, N. Car., 49 S. E. Rep. 49.

159. WILLS — Legacies, Charge on Realty.—Legacies held chargeable on real estate of testator, his personal property having been absorbed in trusts created before his death.—McManus v. McManus, N. Y., 72 N. E. Rep. 235.

160. WILLS—Mental Capacity.—A finding by the jury of want of testamentary capacity of testator rendered harmless the error, if any, in submitting the issue of undue influence under the evidence.—*In re* Selleck's Will, Iowa, 101 N. W. Rep. 453.

161. WILLS—Oral Contract to Convey Farm to Son.—An agreement whereby a father was to convey a farm to his son, in consideration of the latter's remaining at home and managing the farm, was broken by the conduct of the son in leaving the farm and removing to another locality.—Eastwood v. Crane, Iowa, 101 N. W. Rep. 481.

162. WITNESSES—Action to Quiet Title.—A party to an action to quiet title may testify that he derived title from his son, who died childless, leaving no other heir.—English v. Otis, Iowa, 101 N. W. Rep. 293.

163. WITNESSES—Credibility, Questions on Cross-Examination.—A man and his wife, prosecuting witnesses, cannot be compelled on cross-examination to answer questions as to their marriage to affect their credibility. —Flohr v. Territory, Okla., 78 Pac. Rep. 565.

164. WITNESSES—Cross-Examination.—It is not cause for reversal to rule out a question asked on cross-examination to lay the foundation for impeachment, when it refers to immaterial matter.—Illinois Steel Co. v. Jeka, Wis., 101 N. W. Rep. 399.

165. WITNESSES—Unwilling Witness, Leading Question. —Where prosecuting witness was an unwilling witness, it was not an abuse of discretion to allow the prosecuting attorney to ask leading questions.—State v. Newman, Minn., 101 N. W. Rep. 499.

166. WITNESSES — Wife's Testimony, Alienation of Wife's Affection.—Under Comp. Laws, § 10,213, a wife cannot testify, even by consent, in an action by husband against a third person for alienation of affections, when a count charges adultery.—Knickerbocker v. Worthing, Mich., 101 N. W. Rep. 540.